No. 15869

In the United States Court of Appeals for the Ninth Circuit

ALBERS MILLING COMPANY, A CORPORATION, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

On Appeal from the Judgment of the United States District Court for the Southern District of California

BRIEF FOR THE APPELLEE

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OPINION BELOW

The findings of fact and conclusions of law of the District Court (R. 18-24) are not officially reported.

JURISDICTION

This appeal involves federal transportation taxes for the period July 7, 1950, to October 31, 1950, during which period the taxes in dispute in the amount of $28,027.84 were paid. (R. 21-23.) Claim for refund was filed on August 4, 1953, and was rejected on July 23, 1954. (R. 23.) Within the time pro-

vided in Section 3772 of the Internal Revenue Code of 1939, and on July 18, 1956, the taxpayer brought an action in the District Court for recovery of the taxes paid. (R. 1-7, 23.) Jurisdiction was conferred on the District Court by 28 U.S.C., Section 1346. The judgment was entered on November 7, 1957. (R. 25.) Within sixty days and on January 2, 1958, a notice of appeal was filed. (R. 25.) Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

QUESTION PRESENTED

Whether taxpayer is not required by Section 3475 (a) of the Internal Revenue Code of 1939 to pay transportation taxes on shipments of property which were made entirely within the United States solely because the freight charges were paid for by checks, drawn on a United States bank and a Canadian bank, which were mailed to Canada and manually delivered to the offices of the carriers located outside the United States and where the sole purpose of this method was to avoid the transportation tax.

STATUTE INVOLVED

Internal Revenue Code of 1939:

> SEC. 3475 [As added by Sec. 620(a), Revenue Act of 1942, c. 619, 56 Stat. 798]. TRANSPORTATION OF PROPERTY.
>
> (a) *Tax.*—There shall be imposed upon the amount paid within the United States after the effective date of this section for the transportation, on or after such effective date, of property by rail, motor vehicle, water, or air from one

point in the United States to another, a tax equal to 3 per centum of the amount so paid, except that, in the case of coal, the rate of tax shall be 4 cents per short ton. Such tax shall apply only to amounts paid to a person engaged in the business of transporting property for hire, including amounts paid to a freight forwarder, express company, or similar person, but not including amounts paid by a freight forwarder, express company, or similar person for transportation with respect to which a tax has previously been paid under this section. In the case of property transported from a point without the United States to a point within the United States for that part of the transportation which takes place within the United States. The tax on the transportation of coal shall not apply to the transportation of coal with respect to which there has been a previous taxable transportation.

* * * *

(26 U.S.C. 1952 ed., Sec. 3475.)

STATEMENT

This case was tried upon the pleadings (R. 1-10) and a written stipulation of facts (R. 11-16). There is no controversy about the facts which are as follows:

The taxpayer, Albers Milling Company, is an Oregon corporation which has its general offices and principal place of business in Los Angeles, California. (R. 18-19.)

During the period from July 7, 1950, to October 31, 1950, taxpayer shipped various quantities of its goods and merchandise between various points in the United States over the lines of various railroads and by mo-

tor carrier.[1] All such shipments originated and terminated within the United States. The carriers sent their bills for freight for the shipments to taxpayer at its offices in the United States. (R. 19.)

The bills, together with taxpayer's checks in payment thereof, including the amount of the tax payable under Section 3475, were mailed by taxpayer to the office of an affiliated company in Vancouver, British Columbia. Mr. D. L. Grout, an employee of taxpayer, traveled twice each week from Bellingham, Washington, to Vancouver, British Columbia, picked up the freight bills and the checks for the payment thereof at the office of the affiliated company and presented them to the agents of the carriers in Vancouver, who accepted the checks in payment and recorded the bills as paid. (R. 19-20.)

Taxpayer's only purpose in mailing checks in payment of the freight bills to its Canadian affiliated company and in having Mr. Grout travel from Bellingham, Washington, to Vancouver, British Columbia, and to deliver the checks in payment of the freight bills to Canadian agents of the carriers in Canada was to save transportation taxes. (R. 20.)

During the period July 7, 1950, to August 7, 1950, the checks with which the freight and tax were paid were drawn upon taxpayer's accounts with banks in

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[1] These lines, all hereafter referred to as carriers, were the Southern Pacific Railroad, Union Pacific Railroad, Northern Pacific Railway, Chicago, Milwaukee, St. Paul & Pacific Railroad, Spokane, Portland & Seattle Railway, Oregon Electric Railway, Pacific Motor Trucking Company and Great Northern Railway. (R. 19.)

the United States. On August 7, 1950, taxpayer opened a bank account with the Canadian Bank of Commerce in Vancouver, British Columbia, and the checks, with which the freight bills and tax from then to October 31, 1950, were paid were drawn upon this account in Canada. Taxpayer's only purpose in opening the bank account in Canada and in subsequently drawing checks on that account in payment of charges for transportation of property between points within the United States was to save transportation taxes. (R. 20-21.)

The taxes paid by checks drawn on banks in the United States, $6,258.21, and the taxes paid by checks drawn on the Canadian bank, $21,769.63, totaled $28,027.84. (R. 21-22.) All the checks issued by taxpayer in payment for the transportation services with which this suit is concerned were deposited by the carriers in banks located within the United States. (R. 22.)

On or before October 31, 1950, all of the checks drawn upon the Canadian bank were, before delivery of them by Mr. Grout to the carriers, presented by Mr. Grout to the Canadian bank for acceptance, and stamped accepted by the bank. (R. 22-23.)

On these facts, the District Court concluded that the transportation tax imposed by Section 3475 was properly due and collectible. (R. 24.)

The taxpayer filed claim for refund for these taxes paid, and the claim was disallowed. (R. 23.) Thereupon this action for refund was commenced, and judgment entered in favor of the United States. (R. 25.) From such judgment the taxpayer here appeals. (R. 25.)

SUMMARY OF ARGUMENT

The issue in the present case is identical and the basic facts are essentially the same as those considered by the Court of Claims in *Kellogg Co.* v. *United States*, and those in *Fisher Flouring Mills* v. *United States*, No. 15819, presently pending in this Court. For reasons more fully developed in our brief in the *Fisher Flouring Mills* case, the decision of the District Court is correct and should be affirmed.

ARGUMENT

Taxpayer Is Required By Section 3475(a) of the Internal Revenue Code of 1939 To Pay Transportation Taxes On Shipments of Property Which Were Made Entirely Within the United States, Payments for Which Were Purportedly Made By Unusual Methods Across the Border In Canada for the Sole Purpose of Avoiding These Taxes

The case at bar presents a factual pattern almost identical to that in *Kellogg Co.* v. *United States*, 133 F. Supp. 387 (C. Cls.), certiorari denied, 350 U.S. 903, and likewise almost identical to that in *Fisher Flouring Mills* v. *United States*, No. 15819, presently pending before this Court.[2] In our brief in the *Fisher Flouring Mills* case we have discussed at length the *Kellogg* decision and have pointed out why that decision correctly interpreted the provisions of Section

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[2] Another case docketed in this Court, *Pacific-Gamble Robinson Co.* v. *United States*, No. 15818, also presents the same factual pattern. A stipulation to hold further proceedings in abeyance until after the decisions in *Fisher* and in this case have been entered was filed on or about April 19, 1958, in *Pacific-Gamble*.

3475(a), *supra*, of the Internal Revenue Code of 1939. For the same reasons therein set forth, the judgment of the District Court in this case should be affirmed.[3]

As in *Kellogg* and *Fisher*, this case involves a situation where payment for transportation of property solely within the United States was made by a circuitous routing of checks through Canada. In the *Kellogg* case, all of the payments were by means of cashier's checks drawn on a United States bank and transported from the United States to Canada by an employee of the taxpayer where they were handed to an agent of the carrier. In *Fisher* the payments were made in three ways: by checks drawn on a United States bank, cashier's checks drawn on the same bank and bank drafts on a Canadian bank purchased by means of a debit to taxpayer's account in a United States bank. All of these instruments were then transported from the United States by an employee of the taxpayer to Canada where they were handed to an agent of the carrier. In this case, the taxpayer mailed the freight bills, together with the checks in payment thereof, to a Canadian affiliate. Then an employee of taxpayer traveled twice each week from Bellingham, Washington, to Vancouver, British Columbia, where he picked up the freight bills and checks and presented them to agents of the carriers in Vancouver. (R. 19-20.) Of the total amount of tax

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[3] To avoid unnecessary repetition and printing expense copies of the Government's brief in this Court in *Fisher Flouring Mills* v. *United States* are being served simultaneously with this brief upon this taxpayer's counsel and the arguments contained in that brief are here incorporated by reference.

paid, $28,027.84, checks drawn on accounts in United States banks totaled $6,258.21 and checks drawn on a Canadian bank account totaled $21,769.63. (R. 21-22.) It has been stipulated that the taxpayer's only purpose in following this procedure and in opening a bank account in Canada was to save transportation taxes. (R. 20, 21.)

As in *Kellogg* and *Fisher*, all of the property in question was shipped from one point in the United States to another point in the United States. The taxpayer, an Oregon corporation, has its principal place of business in Los Angeles, California. (R. 18-19.) The carriers, all located in the United States, sent their freight bills to the taxpayer in the United States. And still within the United States, checks were drawn in payment of the freight charges. (R. 19.) Next, all the checks were deposited by the carriers in banks located in the United States. (R. 22.) The mere fact of mailing the checks to Canada and there delivering them to agents of the carriers does not, it is submitted, make these amounts fall outside the statutory language, "paid within the United States" as set forth by Section 3475(a) of the Internal Revenue Code of 1939. Our argument in *Fisher* more fully develops our position that such amounts were indeed "paid within the United States" as those words are understood in their plain and ordinary meaning. The fact that some of these checks were drawn on a Canadian bank in no way tends to change the substance of these transactions as set forth above. Checks drawn in the United States on a foreign bank, coupled with the other factors here present, consti-

tute payments made within the United States. The location of the drawee bank relates merely to the payment of the check, and not to the payment of the underlying debt. From the facts it is clear that payment of the freight charges took place within the United States.

CONCLUSION

The decision of the District Court is correct and should be affirmed.

Respectfully submitted,

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